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No.

IN THE

Supreme Court of the United States

October Term, 1980.

DENNIS FITZPATRICK, *et al.*,
Petitioners,

v.

EDWARD L. KIRKLAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Question Presented.

Whether in a case involving no Title VII claims and no proof of either prior egregious racial discrimination or a compelling state interest, a state may, on solely racial grounds, add a bonus to the scores of minority candidates on a criterion valid civil service promotion examination, bump non-minority candidates who have passed the test from their earned position on the promotion list, deny them promotion and through use of the racial bonus, promote instead minority candidates who received lower scores.

Parties.

Petitioners include, in addition to those named in the caption the following: Frank McDonnell, Bruce Farrell, Thomas Farron, Vincent DiGiorgio, Robert Vercile Rose, Raymond E. Friss and Bruce Meservey.

Respondents include, in addition to those named in the caption the following: Nathaniel Hayes individually and on behalf of all others similarly situated; The New York State Department of Correctional Services; Russell Oswald, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; The New York State Civil Service Commission; Ersa Poston, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; Michael N. Scelsi and Charles F. Stockmeister, each individually and in his capacity as Civil Service Commissioner.

The involvement of the original Intervenors, Albert M. Ribiero and Henry L. Coons has been rendered moot.

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Opinions Below.

The August 18, 1980 opinion of the Court of Appeals is not yet officially reported but is reprinted at 23 F.E.P. 1217, and is appended to this Petition as Appendix "A."

The January 21, 1980 decision of the District Court is reported at 482 F. Supp. 1179 and is appended to this Petition as Appendix "B."

The January 21, 1980 order and judgment of the District Court is not officially reported. That order and judgment is appended to this Petition as Appendix "C."

The August 22, 1979 order of the District Court is not reported. The order is appended to this Petition as Appendix "D."

The April 2, 1974 opinion of the District Court is reported at 374 F. Supp. 1361 and is appended to this Petition as Appendix "E."

The July 31, 1974 decree of the District Court is not officially reported but is reprinted in 8 EPD ¶9675 and is appended to this Petition as Appendix "F."

The September 18, 1974 supplemental order of the District Court is not officially reported. The supplemental order is appended to this Petition as Appendix "G."

The August 6, 1975 opinion of the Court of Appeals is reported at 520 F. 2d 420 and is appended to this Petition as Appendix "H."

The August 3, 1975 order on remand is not officially reported. The order is appended to this Petition as Appendix "I."

The December 10, 1975 Court of Appeals order denying a rehearing is reported at 531 F. 2d 5 and is appended to this Petition as Appendix "J."

The denial of Respondents' petition for a writ of certiorari from the first Court of Appeals decision is reported at 429 U. S. 823 (1976).

The denial of Respondents' motion for a rehearing on that Petition is reported at 429 U. S. 1124 (1977).

Jurisdiction.

The Court of Appeals entered judgment August 18, 1980. October 31, 1980, Mr. Justice Marshall signed an order extending time for filing this Petition until December 17, 1980. This Court's jurisdiction is invoked under 28 U. S. C. §1254(1).

Constitutional Provisions, Statutes and Regulations Involved.

The relevant constitutional provisions, statutes and rules and regulations are: United States Constitution Fifth and Fourteenth Amendments; 42 U. S. C. §§ 1981 and 1983; Equal Employment Opportunity Commission on Employee Selection Procedures; 29 C. F. R. 1607 §§ 14(8) (a) and 14(8) (d); New York State Constitution Article V, (6) which are set out *seriatim* in Appendix M.

Statement of the Case.

I. Introduction.

Petitioners are Correction Officers in the New York State Department of Correctional Services and have all

successfully passed a criterion validated civil service examination for promotion to Correction Sergeant. They have nevertheless been denied appointment because a racial bonus of 250 points added to the examination scores of all black and hispanic candidates moved some minority candidates with lower test scores ahead of petitioners. The petitioners have intervened and seek certiorari to review and set aside the minority bonus.

II. History of the Litigation.

This action was originally commenced in 1973 under 42 U. S. C. §§ 1981 and 1983 by black and hispanic applicants for the position of Correction Sergeant in the New York State Department of Correctional Services who alleged that their rights to due process and equal protection guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution had been violated by the 1972 Civil Service Examination 34-944 which unlawfully discriminated against their racial group.

The United States District Court for the Southern District of New York found the examination to be unconstitutional and ordered the New York State Civil Service Commission to construct a non-discriminatory Correction Sergeant's examination to be validated by means of empirical criterion-related validation techniques using the Equal Employment Opportunity Commission Guidelines on Employment Selection Procedure 29 C. F. R. §1607.01 *et seq.* (1970) or as later revised ("EEOC Guidelines") as a model. The court also imposed a racial hiring quota. *Kirkland, et al., v. New York State Department of Correctional Services, et al.*, 374 F. Supp. 1361 (S.D.N.Y., 1974) opinion (Appendix E), decree (Appendix F).

The United States Court of Appeals for the Second Circuit in *Kirkland, et al., v. New York State Department of*

Correctional Services, et al., 520 F. 2d 420 (2nd Cir.1975) (Appendix H), affirmed that part of the District Court decision holding the examination unconstitutional and imposing a racial hiring quota for interim hiring while a permanent selection procedure was being developed, *id.* at page 431, Appendix H-20; but finding insufficient proof of a clear-cut pattern of long continued egregious racial discrimination and substantial evidence of reverse discrimination, *id.* at page 427, Appendix H-13, the Court reversed so much of the District Court's order as provided for a permanent racial hiring quota, *id.* at page 431, Appendix H-20.

Plaintiffs' petition for a rehearing was denied by the Court of Appeals. *Kirkland, et al., v. New York State Department of Correctional Services, et al.*, 531 F. 2d 5 (2nd Cir. 1975) (Appendix J). Plaintiffs then filed a petition for a writ of certiorari which was denied 429 U. S. 823 (1976), as was their motion for rehearing on that petition, 429 U. S. 1124 (1977).

Under the supervision of the District Court a new promotion examination (No. 36-435) was constructed and administered to all applicants for promotion to Correction Sergeant. It is this second examination, No. 36-435, which is the subject of this petition.

After the new examination 36-435 was administered and when it was announced that a racial bonus of 250 points was to be added to the composite test scores of all black and hispanic applicants, petitioners moved to intervene under 42 U. S. C. §§ 1981 and 1983 and 28 U. S. C. §§ 1343(3) and (4) alleging in their complaint that the procedure violated their rights under the Fourteenth Amendment to the United States Constitution, 28 U. S. C. §1331; New York State Constitution, Article V, Section 6, New York Civil Service Law and the Rules and Regulations

pursuant thereto. Petitioners alleged that the use of a racial bonus constituted a distinction based upon race in violation of their Equal Protection rights and their right to a merit-based selection guaranteed by the New York State Constitution, the New York State Civil Service Law and the Rules and Regulations promulgated thereunder.

The District Court granted intervention (Appendix C-4) but granted summary judgment against intervenors, deciding that the 250 point racial bonus met EEOC Guidelines and that New York State Law was not offended by the process. The Court totally ignored the petitioners' allegations that their due process and equal protection rights had been violated, *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 482 F. Supp. 1179 (S.D.N.Y. 1980) (Appendix B).

On appeal by the petitioners to the United States Court of Appeals for the Second Circuit, the Court of Appeals upheld the District Court's summary disposition. *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 23 F. E. P. 1217 (2nd Cir. 1980) (Appendix A). In upholding the District Court's determination the Court of Appeals reaffirmed its earlier determination that "no one should be 'bumped' from their position on an eligibility list solely because of his race." *Id.* at page 1219; Appendix A-7, but then proceeded to approve a 250 point racial bonus which does exactly that.

III. Facts.

After the Court of Appeals affirmed that the original examination (34-944) was unconstitutional as violative of the due process and equal protection rights of the original plaintiffs, and after this Court had denied the original plaintiffs' petitions for certiorari and rehearing, the duty

of constructing a new and valid promotion examination was undertaken by the New York State Civil Service Commission.

The work of the Civil Service Commission was under the supervision of the District Court and was subject to the mandates of the Court of Appeals decision. That Court had affirmed the original District Court ruling that the new examination should be constructed using empirical criterion-related validation techniques in accordance with the EEOC Guidelines and that such validation method should be used only "insofar as possible" having due regard for the problems peculiar to civil service testing. *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 520 F. 2d 420, 426 (2nd Cir. 1975); Appendix H-11.

In the course of its opinion, the Court of Appeals succinctly and correctly stated the law as laid down by this Court in the following language:

> "The replacement of individual rights and opportunities by a system of statistical classifications based on race is repugnant to the basic concepts of a democratic society."

Id. at page 427, Appendix H-12.

The Court went on to say, *id.* at page 428, Appendix H-14-15:

> "Once defendants have prepared a court approved job related civil service examination, a deliberate misuse of the resultant eligibility list on racial grounds would seem to be violative of both the New York and the Federal Constitutions.
>
> Civil service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case it was the spoils system; in the latter,

> discrimination. To the citizens of the State of New York, civil service was sufficiently important that they mandated its use by their constitution. In so doing, they 'declared in unmistakable terms that merit, ascertained as therein provided, shall govern appointments and promotions in the public service' and that merit must be ascertained as far as practicable by competitive examination."

Finally, the Court of Appeals said, *id.* at page 429, Appendix H-16:

> "So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be 'bumped' from a preferred position on the eligibility list solely because of his race. Unless the Fourteenth Amendment is applicable only to Blacks, this is constitutionally forbidden reverse discrimination."

In proceeding with the construction of a new examination, the New York Civil Service Commission conducted an extensive analysis of the job of Correction Sergeant and Correction Officer identifying the five job dimensions for Sergeant and developed from that analysis criterion measures for the job of Correction Sergeant. A two part test was developed consisting of a multiple choice written examination and a combination oral test and performance evaluation procedure. The multiple choice written test aimed directly at the job dimensions identified by the job analysis. Following this extensive and painstaking preparation the entire package was submitted to the parties and to the Court for review prior to the administration of the examination. The examination was administered on October 5, 1978. In addition to administering the written test and the supervisory evaluation to the candidates, incumbent Correction Sergeants were also required to take the test and undergo an evaluation by their supervisors.

A copy of the notice of examination is attached to the petitioners' complaint, Exhibit A, Appendix K-49, and a copy of the instructions and manual for the performance raters is also attached to the petitioners' complaint, Exhibit B, Appendix K-55. As is shown by the last document, there were only four areas considered in the performance evaluation. The raters were ordered to assign scores divisible by the number 5 and in no event lower than 50 or higher than 100 and in any event divisible by the number 5. In addition they were emphatically cautioned that any candidate who scored less than 70 on any one of the four dimensions of the performance evaluation would fail the entire examination since it was required that the candidate pass all four dimensions of the performance evaluation with a grade of 70 or higher in order for the written test to have any weight whatsoever. In addition, the raters were advised that any rating of less than 70 or more than 90 must be supported with comments relating to the performance of the ratee. There were two raters for each candidate and the raters were instructed that if they disagreed on the rating for any individual in any of the four categories their rating form would be returned to them for discussion, comments and possible revision of their ratings so that they would agree. If the final difference was more than 5 points the difference would require justification with supporting comments and discussion.

Since the raters were all current or previous supervisors of the applicants being rated and in most cases would continue to work in close proximity to the individual applicants, it is difficult to imagine how, short of a direct order, the employer could have more clearly mandated that applicants be rated not lower than 70 nor higher than 90.

The written tests were scored and the results of that portion and the performance evaluation incorporated into a composite score. The data was analyzed. The resultant

report entitled "Correction Sergeants Selection System: Validity and Ethnic Effect" was submitted to the Court and as is stated by the State's expert, Kenneth Siegal, the "Correction Sergeant selection measures are criterion valid in that significant correlations exist between the selection composite scores (weighted sum of performance dimension ratings and written test) and composite criteria." Appendix L-3. (Emphasis added, see also the Siegel affidavit of October 16, 1979, ¶¶1, 8a and 8c, where Siegal repeats his assertions of criterion validity.) The term "composite criteria" as used by Siegal denotes the four question performance evaluation. Siegal was the expert primarily relied upon by the State, the original petitioners, the District Court and the Court of Appeals in their determination.

Simply stated, comparison of the composite test score (the combination of the performance evaluation and the multiple choice test) with the results of the performance evaluation only, for both the incumbent sergeants group and the applicants as a whole, demonstrated that the examination validly tested comparative capacity of the individuals involved to perform the job of Correction Sergeant. It was criterion valid.

However, despite this finding and according to the Civil Service Commission, as a part of criterion validation, the Commission applied a separate provision of the EEOC Guidelines which calls for analysis of an examination for what was formerly called "differential validity" but is now called "unfairness" under the 1978 EEOC Guidelines. For a definition see Appendix M-5. While the EEOC Guidelines make an unexplained and unconvincing claim that "differential validity" and "unfairness" are not identical, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290, 38294 (1978), Siegal, appears to regard them as identical (Appendix L-3) as do the courts below.

To determine whether the examination was "unfair" the "composite test scores" for each applicant who received the same performance evaluation rating, were grouped by racial identity. For example, the composite scores of those minority applicants who received 85 on the performance evaluation were compared with the composite scores of those non-minority applicants who received 85 on the performance evaluation. By this process it was found that minority applicants scored on an average, 268 points less on the "composite test score" than non-minorities who had the same performance evaluation rating.

The four dimensions contained in the performance evaluation, were no more and no less job related than the questions on the written examination. However, the scoring system on the performance evaluation contained unlimited potential for racial and other bias, either conscious or subconscious. There was no valid reason to discredit the written examination while according absolute faith to the subjective performance evaluation.

When the same analysis was performed on the two racial groups of incumbent sergeants who took the examination, no comparable variation was identified.

The Guidelines define "unfairness" in 29 C.F.R. §1607.14 (8) (a) (1978):

> "(a) *Unfairness defined.* When members of one race, sex or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores." (Emphasis added.)

Based on these findings, the Civil Service Commission decided the examination was unfair and added a "fairness bonus" of 250 points to the score of every minority applicant. The "fairness bonus" was based upon an application of EEOC Guidelines §1607.14 (8) (d), which provides:

> "(3) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected." (Emphasis added.)

The adjustments were made despite the fact that it had been found that the composite of the written test and the performance evaluation measured *significant job related* criteria—the court mandated standard of criterion validity.

The Siegal affidavit (Appendix L) must be carefully analyzed in order to evaluate his methodology. He points out that Appendix L-9, Exhibit A in the column UROT V. 21214 at level .139, the non-minorities had an average composite score of 7923 while the blacks and hispanics had an average score of 7647. He neglects to point out that while the non-minority group on the average scored considerably higher than the minority group at most levels, this was by no means universal. For example, in column UROT V. 21214 at level -.415 the non-minority group scored only 9 points higher than the minority group. While

in column 76 SGCMP V. 2-21214 at level -.138, the minority group scored 179 points more than the white group and at level -1.246 the minority group scored 56 points higher than the white group.

Siegal states in his affidavit that he did not consider any group containing less than two individuals in his statistical studies. As Exhibit A reveals, some of these exluded groups were as large as 133. Therefore, it is obvious that for at least some groups there were minority candidates who finished ahead of some of the non-minority candidates to the end that Siegal's methodology substitutes a faceless statistical average for the individual rights and merits of the applicants.

All of the petitioners being non-minority Correction Officers who passed Civil Service Examination No. 36-435 were "bumped" from their position on the eligible list by the awarding of the 250 point bonus to minority candidates on strictly racial gounds. Petitioners earned their numerical standing on the eligible list by competing on a criterion validated test. None of the petitioners have been promoted to sergeant. Some of the petitioners have been deprived of promotion to the sergeant position which they otherwise would have already received while for all of the others, the racial bonus has greatly reduced or altogether eliminated the possibility that they will be reached for promotion at any time during the life of the eligible list.

After a diligent effort, the parties were unable to cite to the court below any case authority that allowed the addition of a racial bonus to scores on a criterion valid examination. The ony authority cited to the District Court approving of the use of a racial bonus was a letter from the *Equal Employment Opportunity Commission itself* saying that in their opinion the procedure was justified under the EEOC Guidelines.

The District Court held that the addition of the 250 point racial bonus to the score of each minority test taker was not a quota because the plan approving the adjustment did not establish a fixed number of minority members to be promoted. The Court never addressed the fact that the racial bonus was a distinction based solely upon race, it ignored the petitioners' claim that the racial bonus deprived them of their right to a merit-based test guaranteed by the New York State Constitution and Civil Service Law and that the racial bonus deprived them of their due process and equal protection rights guaranteed by the United States Constitution.

On appeal, petitioners argued that under *University of California Regents v. Bakke,* 438 U. S. 265 (1978), any line drawn on the basis of race or ethnic status must be examined with strict scrutiny and that when such a test is applied, before the distinction will be upheld there must be a showing of a compelling state interest, a history of past discrimination and a showing that a discrete group of innocent persons are not bearing the burden of an otherwise benign program. The petitioners pointed out that there had been no showing of any compelling state interest, that the Court of Appeals had specifically noted the paucity of proof of any past history of discrimination and that innocent Correction Officers who in no way discriminated against the respondents were being forced to bear the burden of the program.

The petitioners also asserted that despite the fact that the EEOC Guidelines were applied, the case was brought under the Due Process and Equal Protection clauses of the United States Constitution and not under Title VII of the 1964 Civil Rights Act and that petitioners were asserting their rights under the same constitutional provisions. The Constitutional standard for measuring discriminatory impact of examinations was set forth in *Washington v.*

Davis, 426 U. S. 229 (1976), which held that a criterion validated examination, which the examination at bar was found to be, is not invalid merely because it affects a greater proportion of one race than another. A criterion validated examination is all that is required. The Constitution does not guarantee equal results.

The Court dismissed the petitioners' argument that *Washington v. Davis,* 426 U. S. 229 (1976), controlled this case by saying "it is settled law of this case that the sergeant's test which Test No. 36-435 replaced was discriminatory." *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 23 F. E. P. 1217, 1218, n. 2 (2nd Cir. 1980) Appendix A-6. The statement begs the issue. There is no question regarding the first examination. The question is whether the second examination violates the rights of the petitioners.

The petitioners argued that a racial bonus was a "de-facto quota" based solely on race disguised by testing jargon, and that it was added without any showing of a compelling state interest, a prior history of past discrimination or inquiry into the adverse impact on a discrete group of innocent persons.

The Court of Appeals held that the racial bonus was not a quota and did not constitute reverse discrimination even though it stated, "[o]f course, the 250-point differential does operate to favor minority test-takers, if one assumes that the multiple-choice written portion of the exam is a truly objective measure of qualities important to success as a correction officer." *Id.* at page 1219, Appendix A-7. It justified the racial bonus by referring to the State's interest in non-discriminatory hiring in correctional institutions. *Id.* at page 1219, Appendix A-8. This reference to a State interest in the Court of Appeals' record opinion came despite the fact that the first time any indication of a state

interest was ever discussed was in an appendix to the brief submitted by the respondents in the record on appeal to the Court of Appeals.

The Court also held that the petitioners' arguments opposing the racial bonus were foreclosed by the Court's earlier decision. The Court based this on an incorrect finding that an examination is not criterion valid until an "unfairness" test had been applied and scores were adjusted on the basis of that unfairness test. *Id.* at page 1219, Appendix A-8. This came despite the agreement of both the District Court and the parties that an "unfairness" test is separate and distinct from a determiation of criteron validity. There has never been any question that Civil Service Test No. 36-435 was criterion valid before the racial bonus was added. Ultimately, however, the simple answer to this erroneous reasoning is that at the time of the first Court of Appeals decision, petitioners, had they then been in the case, had no conceivable way of knowing how the EEOC Guidelines would be applied. At that time, for all anyone knew, a test might be constructed without any question of unfairness ever arising. It is the manner of the application of the EEOC Guidelines in the particular facts of this case as they have developed since the first Court of Appeals decision to which petitioners object. Indeed, the issue would have been premature and unripe if it had been raised earlier.

The petitioners also argued that even if Title VII standards were applied, *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975), requires only a criterion valid examination absent a showing of past egregious racial discrimination. The Court of Appeals did not discuss this argument.

The petitioners asserted that by using the subjective evaluation ratings to measure "unfairness" and justify the racial bonus the results of the objective written portion of the examination were disregarded for minority applicants in violation of the New York State Constitution.

In addressing the question of whether the racial bonus deprived the petitioners of their right to an objective merit-based examination the Court never reached the question of New York Constitutional law or whether the rights of petitioners could be preserved while enforcing the rights of the minority applicants. The Court dismissed the petitioners' arguments holding that the racial bonus was imposed to remedy a violation of the United States Constitution which, therefore, was a matter of federal law under the Supremacy Clause. The Court did say that:

> "Indeed, since the effect of the 250-point differential is to bring the average minority applicant's total raw score up to the level of non-minority test-takers with equal job performance ratings, it can be argued that—at least insofar as deviations from the average are disregarded—the results of the written portion of Test No. 36-435 are entirely superfluous when minority applicants are involved. Kirkland v. New York State Department of Correctional Services, 23 F. E. P. 1217, 1219 (2nd Cir. 1980), Appendix A-9. (Emphasis added.)

Reasons For Granting Certiorari.

I

The Court granted certiorari in *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975), to resolve the confusion concerning "the showing required to establish the 'job relatedness' of pre-employment tests." In so doing, this Court reaffirmed the ruling in *Griggs v. Duke Power Co.,* 401 U. S. 424, 436 (1971), that an employment test must be "[d]emonstrably a reasonable measure of job performance."

To resolve the confusion concerning what showing is required to establish job relatedness, this Court endorsed the use of the EEOC Guidelines then in effect, stating:

> "The message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' 29 C. F. R. §1607.4(c)." *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 431 (1975).

The EEOC Guidelines in effect at the time of the Court endorsement contained a provision for reporting data separately for minority and non-minority groups. EEOC Guidelines 29 C. F. R. §1607.5(a) (1974). The concept involved "different validation." This Court in endorsing the EEOC Guidelines directed that the "differential validation" should be applied if technically feasible. *Id.* at page 435. But there was no comment on what the results of the "differential validation" study could be used for or how they should be used.

Subsequent to the decision in *Albemarle Paper Co. v. Moody,* 422 U. S. 405 (1975), the EEOC Guidelines were revised. 29 C. F. R. §1607.1 *et seq.* (1978). The revisions included provisions dealing with "unfairness," which replaced the earlier provisions for "differential validation."

This court has never determined the extent to or the way in which differential validation may be used and has never had occasion to even consider the so called "unfairness" doctrine. Even more important, no case in this Court involving enforcement of the Fifth and Fourteenth Amendment rights of equal protection and due process has ever even considered whether the Constitution guarantees the application of the differential validity or unfairness doctrine. The courts below have held that these EEOC-created concepts of "differential validity" and "unfairness" are Constitutionally guaranteed by holding that even where a test is carefully and painstakingly constructed under Court

supervision and is found to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated," *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 431 (1975), if competing racial groups do not achieve identical rates of success on the examination, a racial bonus will be awarded to guarantee equality of results.

Examination of the basis for and reliability of "differential validity" and "unfairness" reveal that the concepts are not only controversial and uncertain (facts which the experts relied on by the plaintiffs, the State and the courts below concede) but have also been soundly rejected by leading experts in the field of psychological testing.

The maximum possible score on 36-435 was 8830, Siegal, Appendix L-7. Siegal's affidavit, sworn to December 3, 1979, states in paragraph 8 that "the average difference between white [and] minority scores across all levels of performance is 268." His affidavit discusses how the racial bonus of 250 points was arrived at and explains that, "[t]he adjustment should be somewhat conservative to allow for the statistical or psychometric uncertainties in the data . . . and to avoid over-correcting for the observed differences." Stripped of the jargon, Siegal is admitting that the racial bonus is based on uncertainties and is an approximation.

Richard S. Barrett, a testing expert who testified on the trial for the plaintiffs also submitted an affidavit, sworn to December 7, 1979, in support of the motion for summary judgment. Barrett participated in the drafting of EEOC Guidelines. His affidavit mentions and contains his publication entitled, *"Statistical Diagrams"* produced sometime since March, 1978. In discussing "unfairness" in that document he says:

> "The debate over the existence of unfairness has been with the profession for at least 10 years, and will probably continue for a long time. For example, the Spring 1976 issue of Journal of Educational Measurement was devoted entirely to articles on bias in selection, without resolving the problems of the definition of selection bias, much less settling issues about its nature and extent."

In summary his document says:

> "The variations in test scores, performance measurements, and validities are endless. Further, the effect of a given selection procedure depends on how it is used, and how it relates to other selection procedures used in conjunction with it. These complexities, along with the difficulty in arriving at a socially, politically, and statistically acceptable definition of fairness will keep the debate alive for a long time to come." (See affidavit of Richard S. Barrett, December 7, 1979.)

This is hardly a convincing endorsement of the validity or accuracy of a concept being used to violate petitioners' rights to equal protection.

Other experts in the field of psychological testing have rejected the concepts of unfairness and differential validation as "statistical artifacts" with no sound basis in supporting facts. Schmidt and Hunter, The Future of Criterion-Related Validity, 33 Personnel Psychology 41, 53-54 (1980); Campbell, An Investigation of Sources of Bias in the Prediction of Job Performance, a Six Year Study, Educational Testing Service, Princeton, New Jersey, P. R.-73-37 (September, 1973); APA Task Force on Employment Testing of Minority Groups, Job Testing and the Disadvantaged, 24 Am. Psych. 637, 641 (1969).

Legal commentators have voiced similar concerns that the concept upon which differential validity and unfairness are based has no sound basis in proven fact. Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1129 (1971); Ruch and Ash, Comments on Psychological Testing, 69 Colum. L. Rev. 608, 611 (1969).

Even the drafters of the EEOC Guidelines themselves recognize that the validity of the concept of "fairness" is open to serious debate. An overview of the Uniform Guidelines on Employment Procedures, 43 Fed. Reg. 38290, 38,294 (1978).

This criticism has been reflected in the decisions of the courts when commenting on "differential validity." *Vulcan Society of New York City Fire Dept., Inc. v. Civil Service Commission,* 490 F. 2d 387, 395, n. 10 (2d Cir. 1973); *United States v. Georgia Power Company,* 474 F. 2d 906, 914 (1973). In fact, the court in *Georgia Power Company* recognized the serious scientific problems inherent in a "differential validity" study. It directed that the differential validity study be undertaken because "the safest validation method is that which conforms with the EEOC Guidelines." *Id.* at page 914.

Mr. Chief Justice Burger cautioned against a slavish endorsement of the EEOC Guidelines:

> "Such comment would not be a mere formality in light of the fact that many of the EEOC Guidelines are not universally accepted. For example, the Guideline relating to 'differential validation,' upon which the Court relies in this case, *ante,* at 435, has been questioned by the American Psychological Association." *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 452, n. 3 (1975).

New York State Civil Service Examination No. 36-435 for promotion to Correction Sergeant was tested by the New York State Civil Service Commission for criterion validity and was found to be criterion valid as "significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." Appendix L-3.

Despite the finding of criterion validity the unfairness provisions of the EEOC Guidelines were applied based opon a procedure which gave primacy to an obviously subjective performance evaluation carved out under rigid instructions heretofore discussed which virtually required the raters to pass the applicants and to agree in their ratings. The courts below have thus held that under the United States Constitution no objective, written, job and merit related civil service examination can ever be valid if it disagrees with the ratings developed from a subjective performance evaluation.

The Court of Appeals decision has thus dramatically expanded the scope of the endorsement this court has given to the use of the EEOC Guidelines. In *Albemarle Paper Co. v. Moody,* 422 U. S. 405, 417 (1975), this Court reiterated its holding in *Griggs* regarding the purposes of Title VII:

> "As the Court observed in *Griggs v. Duke Power Co.*, 401 U. S., at 429-430, the primary objective was a prophylactic one.
>
> 'It was to achieve *equality of employment opportunity* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.' "

This Court has made it clear that their endorsement of the EEOC Guidelines was meant to guarantee equality of opportunity, by requiring a job-related examination. By

using the EEOC Guidelines to justify a 250-point racial bonus added to the score earned on an already criterion valid examination, the Court of Appeals has directed that an employment test must guarantee "equality of results" a step which ultimately denies equality of opportunity to non-minorities.

The Court of Appeals has approved a slavish and unthinking application of the EEOC Guideline provisions dealing with "differential validity" or "unfairness" without meaningful inquiry into the constitutionality of their application relative to applicants discriminated against by the racial bonus.

This Court has never endorsed the concept of "unfairness" which was added to the EEOC Guidelines after the *Albemarle* decision nor has it even examined the question of what may be done when "unfairness" is found without violating the Equal Protection rights of all test takers.

The EEOC Guidelines are referred to by hundreds of employees, both public and private, who are attempting to design effective, non-discriminatory tests based on merit. Those examinations impact millions of citizens including over 2,000 people on the eligibility list in question.

The number of employers and employees who are affected by the EEOC Guidelines establishes the need for a clear and final determination of what an employer must do to validate an examination without which employers will continue to be flooded with lawsuits from both minorities and non-minorities. Tens of thousands of individual employees will have the determination of their employment status placed in doubt and delayed for prolonged periods to say nothing of the wage loss to employees who are wrongfully denied employment or promotion.

The fact that the concepts of "unfairness" and "differential validation" have been soundly criticized adds further urgency to this Court's review.

This holding that to be valid a civil service promotion test must not only be job related, but must also pass a test of "unfairness" is a dramatic departure from this Court's decision. The Court of Appeals has imposed a requirement of equality of results in direct contravention to this Court's prior holdings. *Personnel Administration of Mass. v. Feeney,* 422 U. S. 256, 273 (1979).

We submit that while use of the unfairness doctrine of the EEOC Guidelines may be financially "safe" for employers and competitively advantageous to the plaintiffs, the technique is not guaranteed by the United States Constitution and as applied herein violates petitioners' constitutionally guaranteed equal protection rights.

The constitutional guarantee of equal protection is the pledge of America to each individual. It is well established that this guaranty runs to each *individual* citizen and is not limited in its application to broad faceless ethnic, religious or racial groups. *Shelley v. Kraemer,* 334 U. S. 1 (1948).

The courts below in their zeal to dispose of an old and troublesome case have failed to consider the precious rights of the individual petitioners.

II.

This Court considered the legal limits of minority preferences in *University of California Regents v. Bakke,* 438 U. S. 265 (1978). There, all five of the Justices who reached the question of whether Alan Bakke's Equal Protection rights were violated applied a standard of at least "strict" and "searching" scrutiny of racial classifications. A majority of the Court held that before a racial classification will be upheld an *important* and *articulated* purpose for its use must be shown.

Mr. Justice Powell wrote that, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Id.* at page 291. He continued saying, "[w]e have held that in 'order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment' of its purpose or the safeguarding of its interests." *Id.* at page 305.

Here, the Court of Appeals ignored petitioners' claim of an Equal Protection violation and held that a 250-point bonus added solely on a racial basis to the scores of an already criterion validated test was not a quota and was, therefore, lawful. *Kirkland, et al., v. New York State Department of Correctional Services, et al.,* 23 F.E.P. 1217 (2nd Cir. 1980), Appendix A.

The Court of Appeals did not apply the "strict" or "searching" scrutiny test to the racial bonus but erroneously based its decision on a semantic but legally and practically meaningless distinction between a quota and a bonus in direct contravention of *University of California Regents v. Bakke,* 438 U. S. 265 (1978). Indeed, the Court of Appeals totally denied petitioners their right to an adjudication of their constitutional rights to equal protection.

Not without significance is the fact that in this highly dangerous world of the Correction Officer and Correction Sergeant, those black and hispanic individuals who have been or will be appointed with the benefit of the 250 point racial bonus will be stigmatized throughout their correction career as individuals who could not measure up and make it on their own but required a bonus to qualify for appointment.

A clear demonstration of the continuing concern regarding racial preference is found in the recent grant of certiorari in *Minnick, et al., v. California Department of Corrections, et al.*, No. 79-1213, 65 L. Ed. 2d 1139 (1980), which concerns the question of whether a public employer may grant preferences in employment and promotion to racial minorities and women absent any showing of past invidious discrimination. In *Minnick* the employer asserted a compelling state interest albeit an insufficient one.

Here, there is an even stronger case to grant certiorari since there has been no showing of past invidious discrimination, no proof of a compelling state interest requiring a preference and in this case the preference in the form of a racial bonus is being superimposed on the results of an otherwise criterion valid examination.

The Court of Appeals has held that as between races, the Constitution of the United States guarantees equality of results in employment tests without any inquiry into a compelling state interest, history of past discrimination, or adverse burdens on innocent parties or even the comparative performance in the examinations.

III.

Washington v. Davis, 426 U. S. 229, 247 (1976), held that the standard applied for reviewing employment tests in an Equal Protection case is separate and distinct from the standard applied in a case based on Title VII of the Civil Rights Act.

This Court said that in an Equal Protection case:

> "We have not held that a law, neutral on its face and serving ends otherwise within the power of

> government to pursue, is invalid under the Equal Protection Clause, simply because it may affect a greater proportion of one race than of another." *Id.* at page 242.

Neither respondents nor petitioners are asserting Title VII claims herein. The first District Court and Court of Appeals decision directed that a job related examination based on merit be constructed. The direction to use the EEOC Guidelines for validation "insofar as feasible" did not transform this into a Title VII case. Yet, that is precisely what the courts below have done by their approval of a racial bonus generated from a blind pursuit of the EEOC Guidelines without the slightest showing of any intent to discriminate or any past invidious discrimination and in the face of the manifest injury to innocent applicants.

The Court of Appeals approved the racial bonus without any inquiry into an intent or purpose to discriminate as consistently required by this Court in any Equal Protection case. *University of California Regents v. Bakke,* 438 U. S. 265, 289, n. 27 (1978); *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U. S. 252, 264-265 (1977); *Washington v. Davis,* 426 U. S. 229, 242 (1976).

The Court of Appeals for the Second Circuit has dangerously distorted this Court's prior holdings requiring express congressional legislation before extending Title VII standards into an Equal Protection inquiry.

The prominence of the Court of Appeals for the Second Circuit precludes any reliance on the thought that its error might go without influence. This Court should grant certiorari to once again reassert the distinction between a Title VII case and one arising under the Equal Protection Clause.

Conclusion.

In light of the continuing controversy surrounding the "unfairness" provisions of the EEOC Guidelines which have never been passed upon or applied by this Court, the importance of the individual rights involved, the large number of parties whose rights are impacted by this issue and the conflict of the decision of the United States Court of Appeals for the Second Circuit with decisions of this Court, it is urgent and important for this Court to grant certiorari and decide whether the EEOC Guidelines on "unfairness" are applicable in a case involving solely constitutional issues and whether, as part of the validation process the unfairness concept can be utilized to add a bonus awarded purely on a racial basis to the scores of minority candidates even though the racial bonus will "bump" qualified individuals from their merit-earned position on a civil service promotion list.

Respectfully submitted,

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